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No. 84-757

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

—against—

EDWARD I. KOCH, as Mayor of the City of New York, et al,

Respondents,

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

—against—

MORRIS GOLDSTEIN and RUTH GOLDSTEIN,

Respondents,

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

—against—

SEYMOUR GILLMAN, Trustee in Bankruptcy for SHERRY TOBACCO COMPANY, INC., et al,

Respondents.

RESPONDENTS, MORRIS AND RUTH GOLDSTEINS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

JESSEL ROTHMAN
Counsel for Respondents Goldstein
170 Old Country Road
Mineola, New York 11501
(516) 294-9449

Of Counsel: Lisa J. Rinaldi

December 10, 1984

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RESPONDENTS, MORRIS AND RUTH GOLDSTEINS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OF THE CASE

Morris Goldstein was injured on July 14, 1977 while ascending a pitch black windowless staircase at 2410 Barker Avenue, Bronx, New York. The proximate cause of the accident was that the stairs, which were statutorily mandated to be illuminated, were pitch black because of the gross negligence of CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., (hereinafter referred to as "Con Ed") in operating and maintaining its electric transmission lines (hereinafter referred to as "the 1977 Blackout"). Con Ed's gross negligence resulted in causing a cessation of electrical service in the entire New York area allegedly resulting in more than 300 valid law suits for alleged damages in excess of $130,000,000.00[1].

Prior to the trial of the action of Morris Goldstein and Ruth Goldstein (hereinafter referred to as "Respondents") against Con Ed in the Supreme Court of the State of New York, Bronx County, the Respondents moved for partial summary judgment on the issue of Con Ed's gross negligence in causing the cessation of electrical service pursuant to the doctrine of collateral estoppel.

The basis of the motion for partial summary judgment was a decision by a jury (reduced to judgment) in a court of record of competent and comparable jurisdiction, to wit, the Supreme Court of the State of New York, Bronx County, that Con Ed's gross negligence caused the 1977 Blackout. *Food Pageant, Inc. v. Consolidated Edison Company, Inc.*, 54 N.Y.2d 167 (1981). That jury verdict and the attendant judgment was sustained on all issues of law by the highest Court of the State of New York, the New York State Court of Appeals. *See, Food Pageant, Inc. v. Consolidated Edison Company, Inc., supra.*

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[1]Petitioner's figures, not Respondent's.

The Respondents' motion for partial summary judgment was denied by the lower court. The Respondents appealed the denial to the Supreme Court, State of New York, Appellate Division, First Department, which reversed the lower court and held that the doctrine of collateral estoppel applied, and Con Ed was precluded from relitigating the determination that the 1977 Blackout was caused by Con Edison's gross negligence. However, Con Ed was not precluded from litigating two questions: (1) whether or not the 1977 Blackout was the proximate cause of Mr. Goldstein's fall; and (2) whether there was privity of contract between Mr. Goldstein and Con Ed. *Goldstein v. Consolidated Edison of New York, Inc.*, 93 A.D.2d 589.

Con Ed appealed that holding to the New York State Court of Appeals.

The *Goldstein* appeal was decided simultaneously with two appeals then pending, to wit: *Edward I. Koch, as Mayor of the City of New York, et al, v. Consolidated Edison Company of New York, Inc.*, and *Seymour Gillman, Trustee in Bankruptcy for Sherry Tobacco Company, Inc., et al, v. Consolidated Edison Company of New York, Inc.*. All three appeals were heard simultaneously and a decision in favor of *Koch, Goldstein* and *Gillman* was encompassed by the opinion written by the Court of Appeals in *Koch*, 62 N.Y.2d 548.

In the opposition to the motion for summary judgment in *Goldstein, supra,* and in support of its appeals both in the Appellate Division of the Supreme Court of the State of New York and the New York State Court of Appeals, (*Goldstein, supra,* 62 N.Y.2d 936) Petitioner raised primarily the same issues it appears to raise in the application to this Court, to wit; that the application, in cases arising out of the 1977 Blackout, of the offensive use of the doctrine of collateral estoppel is unfair because: (1) in the trial relied on by Respondents, to wit, *Food Pageant, Inc. v. Con-*

solidated Edison Company, Inc., Con Ed did not introduce or attempt to introduce evidence of physical, political and financial restraints which influenced the system's reliability because of a remark made by the trial judge when trial counsel for Con Ed opened to the jury[2]; and (2) in the Small Claims Court of the Civil Court of the City of New York (courts which are not of record), in five trials, where the plaintiffs were individuals not represented by attorneys and Con Ed was represented by attorneys; Con Ed was able to convince the judges sitting in Small Claims Court that gross negligence had not been proven by the plaintiff in said five instances, and because of this unfairness in the application of the offensive use of the doctrine of collateral estoppel, which doctrine was found constitutional by this court in *Parklane Hosiery vs. Shore*, 439 U.S. 322, 330, in *Goldstein v. Consolidated Edison of New York, Inc.*, the Petitioner, Con Ed, has been deprived of due process under the Fourteenth Amendment to the Constitution of the United States.

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[2]There is some intimation in *Koch v. Consolidated Edison of New York, Inc.*, 62 N.Y.2d 548, that the New York State Court of Appeals was under the impression that Con Ed did not want to introduce proper evidentiary matters on these issues, but sought to introduce hearsay investigative reports resulting from federal and state investigations of the 1977 Blackout.

SUMMARY OF ARGUMENT

Because the New York State Court of Appeals has held that third-party issue preclusion bars Consolidated Edison of New York, Inc. from relitigating the issue of its gross negligence with regard to the 1977 Blackout, this Court is precluded from re-determining that issue. As a result thereof, the Petition for a Writ of Certiorari must be denied.

In the event the Court elects to determine the Petition on its merit, there is no merit to the Petition for there is no important unresolved constitutional question which was not resolved by this court's decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) and *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

POINT I

THE UNITED STATES SUPREME COURT IS BARRED FROM REVIEWING THE HOLDING OF THE NEW YORK STATE COURT OF APPEALS THAT THE DOCTRINE OF COLLATERAL ESTOPPEL IS APPLICABLE IN GOLDSTEIN V. CONSOLIDATED EDISON OF NEW YORK, INC.

The Court of Appeals of the State of New York (hereinafter referred to as the "Court of Appeals") having heard all of the arguments proferred by Con Edison before this Court and having determined that the doctrine of collateral estoppel, applied offensively, prohibited Con Ed from relitigating the issue of its gross negligence with regard to the 1977 Blackout in the trial of *Goldstein v. Consolidated Edison of New York, Inc.*, 93 A.D.2d 589, 62 N.Y.2d 936; said determination precludes this Court from redetermining that issue and Con Ed's petition for a writ of certiorari must be denied.

This court's decision in *Brinkerhoff-Faris Trust and Savings Company v. Walter O. Hill*, 281 U.S. 673 (1929), affirms that the contention of the Respondents herein is correct:

> It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of State courts is limited to their decisions on federal questions: and that the mere fact that a State court has rendered an erroneous decision on a question of State law, or has overruled principles or doctrines established by previous decision on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer Appellate jurisdiction on this court.
> *Brinkerhoff, Id.* at pg. 680.

See, also, Allen v. McCurry, 449 U.S. 90, in which this court commented:

> Indeed, though the federal courts may look to the common law or to the policy supporting *res judicata* and collateral estoppel in assessing the preclusive affect of decision of other federal courts, Congress has specifically required all federal courts to give preclusive affect to state court judgments whenever the courts of the state from which the judgments emerged would do so.

Allen v. McCurry, supra, at p. 96.

POINT II

PETITIONER FAILS TO RAISE ANY CONSTITUTIONAL ISSUES TO BE DETERMINED BY THIS COURT.

In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), this Court noted in discussing the potential constitutional bar to the use of the doctrine of collateral estoppel as follows:

> (i) it had already recognized that there was no denial of due process where the defendant had been *given one opportunity to litigate an issue* and that the issue had been fully litigated and the defendant lost, citing *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971);
>
> (ii) There is no constitutional right for the defendant who lost in the first action to be given a second bite at the apple;
>
> (iii) the question of due process was not violated where instead of the defensive use of collateral estoppel, there was an attempt to use collateral estoppel offensively.

The safeguards mandated by the decisions of this court in *Parklane Hosiery Co. v. Shore, supra*, and *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, supra*, are found in *Schwartz v. Public Administrator of the County of Bronx*, 24 N.Y.2d 65, 73 (1969). The Court of Appeals in that case adopted the full and fair opportunity test in applying the doctrine and set forth the operative guideline, to wit, size of claim, extent of litigation, competence and experience of trial counsel, availability of new evidence, indications of a compromise verdict, differences in applicable law, and forseeable or future litigation.

In applying those guidelines, the Court of Appeals held that Con Ed had a full and fair opportunity to litigate the issue of gross negligence in the trial of *Food Pageant, Inc. v. Consolidated*

Edison Company, 54 N.Y. 2d 167 (1981).

Food Pageant, Inc. v. Consolidated Edison Company, supra, was the first trial in which the question of Con Ed's gross negligence arising out of the July 1977 Blackout was heard by a trial court of record. There were nine days of trial from April 27, 1979 to May 9, 1979. Food Pageant, Inc. presented evidence of Con Ed's gross negligence, to wit:

> (a) the Hudson-Farragut tie, a power line which linked Con Edison's system with that of the Public Service and Electric & Gas Company of New Jersey, and the Indian Point II power plant was out of operation;
>
> (b) certain gas turbines for use during the hours of peak power demand were also inoperable at the time of the blackout because of the technicians who manned the turbines were sent home early;
>
> (c) Con Edison failed to maintain properly and inspect certain relays and circuit breakers and failed to secure proper protection against lightning for its towers and transmission lines; and
>
> (d) its employee in charge of Con Edison's system on the evening of July 13, 1977, William Jurith, reacted improperly to the crises in that Mr. Jurith lacked the necessary experience, knowledge and expertise to completely perform the functions of his job.

In response to that evidence, Con Ed introduced evidence that:

> 1) The Hudson-Farragut was out of operation because of the prior failure of a complex piece of machinery;
>
> 2) the Indian Point II power plant was also justifiably out of service for repairs;
>
> 3) the gas turbines were not in operation at the time of the incident because the anticipated period of peak power demand during which the turbines were

normally used had expired earlier in the evening;

4) its inspection program for circuits and relays conformed to the appropriate engineering standards;

5) the lightning protection on the Con Edison towers and lines was adequate and proper; and

6) Mr. Jurith had acted properly and did not in any event act grossly negligently. .

Food Pageant, supra, at 171-172.

As part of its charge, the trial court defined gross negligence, marshalled the evidence the plaintiff had presented in that case and instructed the jury that in order to find Con Ed liable, it had to find that the plaintiff proved by a fair preponderance of the credible evidence that Con Ed was grossly negligent. (r-139-144[3]) A six-member jury unanimously answered the specific question on that point in the affirmative. The Court of Appeals found no error in the presentation of the case to the jury, and, by implication, no impropriety in the court's instruction on the law including the legal definition of gross negligence. *Food Pageant, supra.*

As set forth above, Con Ed's position is that the Court of Appeals misapplied the doctrines enunciated by *Schwartz v. Public Administrator of Bronx County, supra,* in two respects: (1) that in *Food Pageant, Inc.,* it was precluded from introducing probative evidence exculpating Con Ed from gross negligence; and (2) the court refused to hold that Small Claims Court judgments constitute judicial findings which would bar the application of the doctrine of collateral estoppel and that refusal was improper.

Both contentions by Con Ed are without merit.

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[3]*Goldstein vs. Consolidated Edison of New York, Inc.,* 93 A.D.2d 589, Record on Appeal, Appellate Division, First Department.

Con Ed's first contention is in effect addressed to the issue of whether Con Ed had a full and fair opportunity to litigate the issue of gross negligence during the *Food Pageant, Inc. v. Consolidated Edison of New York, Inc., supra,* trial. In order to determine if Con Edison's contention has any merit, one must go outside the record before the court(s) in *Goldstein.*

In *Goldstein, supra,* neither in the motion before the lower court, nor in the record presented to the Appellate Division, First Department, nor in the record presented to the Court of Appeals, is there any intimation that Con Ed was precluded from offering evidence in *Food Pageant, Inc. v. Consolidated Edison of New York, Inc., supra,* that physical, political and financial restraints were the cause of Con Ed's gross negligence and excused Con Edison from any liability for its conduct.

The first inkling of this argument by Con Ed was found in the brief Con Ed submitted to the Court of Appeals in the joint appeal *Koch v. Consolidated Edison of New York, Inc., Goldstein v. Consolidated Edison of New York, Inc.* On page 6 of Con Ed's brief the following appears[4]:

> MR. ROCK: [Counsel for Con Edison]: I think you'll see also as this trial progresses that Con Edison is a unique utility. There are certain substantial *physical, political and financial restraints* which influence the system of reliability of Con Edison. *Among these, and you'll be hearing about them, are the failure of the City of New York to allow Con Edison to build plants in the city* ——
>
> MR. LEWIS: [Counsel for Food Pageant, Inc.]: Your Honor, I'm going to object. The City isn't a defendant.

---

[4]Brief of Defendant-Appellant Consolidated Edison Company of New York, Inc. in the Court of Appeals of the State of New York. *Goldstein v. Consolidated Edison Company of New York, Inc.*, 62 N.Y.2d 936.

THE COURT: Sustained.

MR. ROCK: Well, we'll be showing this, your Honor, and we intend to prove this; that the failure to--

MR. LEWIS: Objection your Honor--

MR. ROCK: -- grant permission --

THE COURT: Just a minute. The issue is going to be whether Con Ed was negligent or grossly negligent, whichever the situation is. What has that got to do with whatever contracts you may have with --

MR. ROCK: I'm not talking about contracts, your Honor, what I'm saying is that the Con Ed system, in its uniqueness, has been impinged upon by the failure of the City of the New York to allow Con Edison to build plants here in the City.

***

MR. LEWIS: Objection, Your Honor.

THE COURT: Sustained. You just tell the jury what *you did or what you didn't do, that's what's proper. You tell the jury how Con Edison was not grossly negligent.*

Trial Transcript at pp. 34-36. (Emphasis supplied.)

Respondent unequivocally asserts to this court that during the *Food Pageant, Inc. v. Consolidated Edison of New York, Inc., supra,* trial, Con Ed did not present evidence, proffer evidence or proffer the admission into evidence of the investigative reports which in any manner related to physical, political and financial restraints which were probative of the issue of Con Ed's gross negligence even though all of that evidence was available to Con Ed during the *Food Pageant, Inc. v. Consolidated Edison of New York, Inc., supra,* trial.

As proof of Respondent's contention that there is no basis for counsel of record for Petitioner to state to this court that there was

such evidence proferred and said proffer was denied. Respondent calls this court's attention to a decision by the Appellate Division, Second Department, State of New York in *Shaid v. Consolidated Edison of New York, Inc.*, 95 A.D.2d 610, (2d Dept. 1983) in which Petitioner raised this issue.

In the majority opinion, the Appellate Division stated as follows:

> As to the extrinsically suspect nature of the *Food Pageant* decision, Con Ed argues, dehors the record, that exculpatory material in the "authorative" reports (e.g., its inability to raise new capital for systems improvements) was ruled inadmissible during the *Food Pageant* trial. Again, of course, this alleged error was cognizable upon appeal and, not having been pressed on direct appeal from the judgment, is entirely unpersuasive in what would amount to collateral review here. *Nor would the hearsay conclusion of these reports, no matter how "authorative", be competent as evidence, whether newly discovered or otherwise.*
>
> *Shaid v. Consolidated Edison, supra,* at 615. (Emphasis supplied).

The concurring opinion in *Shaid, supra,* expanded on the opinion and stated:

> I now turn my attention to the contention that Con Edison has *New evidence* which was not presented in the *Food Pageant* case.
>
> It is true that the discovery of significant new evidence after a judicial determination may make collateral estoppel inappropriate. *Vincent V. Thompson,* 50 A.D.2d 211, 221, *supra.* Defendant contends that certain investigative reports which were not before the jury in *Food Pageant, supra,* strongly suggest that it was not grossly negligent. However, these reports were not newly discovered. In fact, they were all in existence by early 1978 and were a part of the evidence in the case

> of *Lee v. Consolidated Edison Company*, 95 Misc.2d 120, *rev'd* 98 Misc.2d 304, which was decided on June 1, 1978. The *Food Pageant* case was tried from April 27, to May 9, 1979.
>
> It is contended that Con Edison was prevented from presenting these reports during the *Food Pageant* trial. *However, defendant has not shown this court any portion of the record of that trial which indicates that it offered any of these reports into evidence or even mentioned them to the Trial Judge.* Significantly, the Court of Appeals in its decision in *Food Pageant*, 54 N.Y.2d 167, *supra*, did not mention any appellate issue concerning these reports.
>
> It is, at least, arguable that important evidence which is improperly excluded in a prior case militates against estoppel attaching to issues in that case, even where the judgment therein was not appealed. However, where the evidence in question was possessed by the opponent of issue preclusion at the time of the prior case, and no attempt was made to have that evidence admitted, it makes no sense at all to say that the party, in this case Con Ed, was thereby not afforded a full and fair opportunity to litigate. Moreover, the policies of promoting fairness for all parties and of promotion judicial efficiency are hardly furthered by encouraging litigants to keep some evidence from the fact-finder in the case so that, if there is an adverse verdict, this "new" evidence can magically appear to prevent collateral estoppel.
>
> *Shaid v. Consolidated Edison Company*, *supra*, at 625-626. (Emphasis supplied.)

Thus, it is clear that there is no basis in fact or in law for the Petitioner to assert to this court that it was prevented from offering any evidence which would have established Con Ed's freedom from gross negligence. Con Ed has no basis in fact or in law to assert to this court that it is precluded from alleging that it was not given a full and fair opportunity to try the issue of gross negligence in the trial of *Food Pageant, Inc. v. Consolidated Edison of New York, Inc.*

The second contention of Con Ed raised by its Petition is that a Small Claims Court judgment is a judicial finding or determination of the type contemplated by *Schwartz v. Public Administrator, supra; B.R. DeWitt,* 19 N.Y.2d 141 (1967) and *State Farm v. Century Home Components,* 275 Or. 97, 55 P. 2d 1185 (1976) which would bar the application of the offensive use of the doctrine of collateral estoppel.

All of the cases cited in the Petition are Small Claims Court cases although some were reviewed by an Appellate Court. The proceedings before a Small Claims Court are informal in which simplified procedures are applied. It is not a court of record.

The Court of Appeals thought so little of Con Ed's argument that it discounted it in approximately ten to twelve lines of its lengthy opinion in *Koch v. Consolidated Edison of New York, Inc.*

> It is first contended that third-party issue preclusion should not apply because there are other judicial determinations concluding that Con Edison was not guilty of gross negligence in connection with the blackout. Whatever might be said of the effect properly to be given to inconsistent determinations of like judicial stature, in this instance *it suffices to dismiss Con Edison's contention to observe that the inconsistent determinations on which it would rely are those in cases tried in Small Claims Part of the Civil Court of New York City as to which informal and simplified procedures are applicable and which by express statutory provision are not to be deemed an adjudication of any fact at issue* (other than the amount involved) with respect to any other action. [Footnotes omitted.] *Koch v. Consolidated Edison of New York, Inc.*, 62 N.Y.2d 548. (Emphasis supplied.)

A more in depth view of why Small Claims Court judgments should not be considered judicial determinations is found in the

majority opinion of the Appellate Division, Second Department, State of New York in *Shaid v. Consolidated Edison, supra:*

> Defendant's [Con Ed] primary argument in opposition to issue preclusion, ... is that applying collateral estoppel would be unfair because there exist several previous judgments in cases stemming from the black-out which are in its favor. *As a general proposition, there does seem to be "something fundamentally offensive about depriving a party of the opportunity to litigate the issue again when he has shown beyond a doubt that on another day he prevailed"* (citations omitted). *If, in one case, the fact finder holds, for example, that a defendant was not negligent and then, in a subsequent case, involving another plaintiff,* the fact finder concludes that the defendant was negligent, why then, other things being equal, should the courts give more credence to the latter verdict so as to estop further litigation of the negligence issue?
>
> While not quarrelling with the general proposition, I do not believe it applies here. The fact is other things are not equal and there is every reason to give more credence to the *Food Pageant* verdict than to other cases in which Con Ed emerged the victor. *Each one of these other cases was a small claims action.* The two reported cases, *Lee v. Consolidated Edison Co.* (95 Misc.2d 120, *supra*) and *Lo Vico v. Consolidated Edison Co.*, (99 Misc.2d 897), reveal that the plaintiffs were *pro se*, although *amicus curiae* briefs were filed, apparently, with respect to certain legal issues. On the other side, Con Ed was represented by the same law firm appearing in this case. In *Food Pageant, (supra)* the plaintiff was represented by counsel. A victory against an opponent who lacks expert legal advice, particularly with respect to the presentation of key evidence which it is his burden to present, is not very noteworthy, whatever the forum. One can only wonder whether the plaintiffs in the small claims actions referred to by Con Ed were capable of presenting evidence of any quality or quantity on a subject as complex as the degree of Con Ed's responsibility for the blackout.

The fact that these other determinations were in small claims court is fatal to defendant's argument. "By statute collateral estoppel effect is denied to *** determinations in small claims actions. [Citations omitted.] Even in the absence of statute, however, these minor suits are illustrative of the type of determination which, under accepted common-law principles, should not be held conclusive in later cases (see, e.g., Restatement, Judgments 2d [Tent Draft No. 4], §68.1, sud. [c], and Comment d)" (*Gilberg v. Barbieri*, 52 N.Y.2d 285, 293, *supra*). If small claims determinations are so lightly regarded as not to be accorded collateral estoppel effect, why then should they be accorded the equivalent status and respect given a contrary determination of the Supreme Court, which has been appealed to the highest court in the State, so as to prevent the latter from serving as a given collateral estoppel effect because, among other things, we are reasonably certain of its correctness. Such certainty is not dispelled because the opponent of issue preclusion can point to a contrary determination of such questionable value that, as a matter of law, it may not be considered credible enough to bind a party in a subsequent action.

The dissent maintains that it is unfair to let '[a] plaintiff with a substantial *** to sit back and wait for a smaller case to proceed with the expectation that the defendant prevailing in the small case can be ignored because the plaintiff with the lesser claim lacked the ability to try the case to the fullest, yet if the defendant loses, collateral estoppel will apply because of the defendant's knowledge of the pendency of the larger claim.' That would be unfair and is, perhaps, one of the reasons that collateral estoppel is, in fact, not applied in small claims actions. If defendant had lost in the small claims actions it refers to, it would still have had the right to litigate the issue of gross negligence in the subsequent *Food Pageant* case.

The dissent's unfairness argument can be refuted by examining the alternative. It would be very unfair to allow a defendant, such as Con Ed in this case, to forever avoid the possibility of collateral estoppel in a

> multiple case situation just because it was able to win one or two minor cases in the small claims court which, naturally enough, came to trial before any substantial case was heard in the Supreme Court. If defendant's view is accepted, a $50 *pro se* suit by Jane Doe, brought because the plaintiff's meat spoiled during the blackout, which is won by Con Ed because Jane Doe is, of course, no match for the counsel and experts commanded by Con Ed, must lead us to conclude that a subsequent verdict in Supreme Court against Con Ed for many thousands of dollars is of such doubtful validity that it may not result in issue preclusion.
>
> It may be appropriate in another case, wherein some factors are present suggesting that the opponent of issue preclusion lacked a full and fair opportunity to previously litigate the issue in question, that the existence of consistent determinations, as exist here, should be accorded some weight, perhaps even to the extent of tipping the scales against issue preclusion. However, this is not such a case. As already seen, defendant has not, in any respect, persuasively argued that it did not have a full and fair opportunity in the *Food Pageant* case to litigate the question of its responsibility for the blackout.
>
> *Id.* at 626-628. (Emphasis supplied).

Thus, the predicates contained on pages 3 and 4 of the Petition are incorrect and misleading. The true facts reveal that there are no factual predicates upon which Con Ed can base its Petition to this court.

POINT III

THERE ARE NO REASONS FOR GRANTING THIS WRIT.

The reasons stated by Con Ed for granting this writ requires the highest degree of sophistry. For it is based upon the premise that "full" doesn't mean "full" and "fair" doesn't mean "fair" but it means something more than fair, to wit, "fundamental fairness".

This argument is entirely specious. It is respectfully submitted that the Petitioner is incorrect when it states that the Court of Appeals sidestepped the due process issue raised by Con Ed. The Court of Appeals did not.

The Court of Appeals found in *Food Pageant, Inc. v. Consolidated Edison of New York, Inc.*, that Con Ed had a full and fair opportunity during that trial to litigate the question of its gross negligence.

That is the due process standard established by this court. This court held in *Parklane Hosiery Co. v. Shore, supra* that there is no constitutional right for the defendant, who lost in the first action to be given a "second bite of the apple".

What Con Ed contends is that when there are 300 lawsuits arising out of the 1977 Blackout, it should be entitled to more than "one bite". That "fairness" in situations such as multiple claims arising out of the same factual predicate such as a disaster like the 1977 Blackout, requires that Con Ed be entitled to 2, 3, 4, 5, 6 or maybe ten bites at the apple. When counsel for Con Ed was asked the question as to how many bites of the apple his client was entitled to, both in the Appellate Division and the Court of Appeals, he stated he didn't know. Maybe ten was enough, maybe twenty was enough, but it should be more than one.

Respondents' statement as to Con Ed's position on this issue is confirmed by the majority opinions of the Appellate Division, Second Department in *Shaid v. Consolidated Edison of New York, Inc., supra:*

> ...Con Ed fails to suggest a meaningful set of criteria that would clearly distinguish those multiple claimant situations in which offensive use of collateral estoppel has been authorized [citations omitted] from those in which it should not be permitted. *Id.* at 621.
>
> ***
>
> ...resurrection of the mutuality of estoppel rule in a multiple claimant situation where there have been inconsistent results cannot possibly restore public confidence in the integrity of the jury trial system. The possibility of inconsistent results is forever present: it is inherent in the adversarial system. Once the inconsistency appears, it cannot be made to disappear by permitting further litigation of the facts in dispute. The unanalyzed assumption in Currie's railroad illustration is that the *minority* result (in which the defendant lost after a string of 25 victories) is the *aberrational* result—in short, *it* is (or may be perceived to be) the *erroneous* fact-finding. This conclusion is neither logical or wise.
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> It is intuitively obvious that, of an infinite number of trials of the disputed issue, at least one would be at variance with the rest. A measure of confidence would attach to the conclusion that the minority of one was an erroneous fact finding. Assuming it were possible to take a *statistically valid sample of these trials, a reasonable measure of confidence would attach to the conclusion that if the deviant decisions represented a sufficiently small minority, such would demonstrate that the majority decisions represented the more accurate fact finding. Possibly an inconsequential degree of error would be introduced into this process if, as a cost-cutting measure, the initial trial was video taped and subsequent trials were limited to playing back the tape to different juries. Yet would anyone*

> *seriously suggest that the definition of a fair trial be expanded to incorporate such a process in order to improve its accuracy? Obviously, accuracy has its costs. In a very real sense, litigants are entitled to only that justice which society is prepared to pay for, and that justice is a single fair trial.*
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> *Id.*, at 618-619. (Emphasis in original). (Footnote omitted).

A most erudite refutation of Con Ed's position is found in a decision of the Supreme Court of Oregon (Hollman, J.) in *State Farm and Fire and Casualty Company, et al. v. Century Home Components*, 275 Or. 97, 550 P.2d at 1189-1190 (1976).

> Once [a] court has concluded that the evidence is sufficient to establish that an identical issue was actually decided in a previous action, *prima facie*, the first judgment should be conclusive. [Citations omitted.] The burden then shifts to the party against whom estoppel is sought to bring to the court's attention circumstances indicating the absence of a full and fair opportunity to contest the issue in the first action or other consideration which would make the application of preclusion unfair. Whether the proferred circumstances and consideration warrant a conclusion that the litigant lacked a 'full and fair' opportunity to litigate the issue and that it would be otherwise unfair to preclude him from contesting the issue again are likewise questions of law. *Collateral estoppel involves a policy judgment balancing the interests of an additional litigant against the interests of the Administration of Justice* and this court reserves the final word as to where the balance is struck in any given case. [Citations omitted].
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> The 'multiple-claimant anomaly' was first hypothesized by Brainerd Currie as one instance where, absent mutuality, the unrestrained application of collateral estoppel might produce unfair results. Currie,

Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 Stan. L. Rev. 281 (1957). Currie posed the situation of a train wreck resulting in 50 separate claims being filed against the railroad for negligence. If the defendant railroad won the first 25 cases and subsequently lost the 26th, Currie characterized as an 'absurdity' the notion that the remaining 24 claimants could ride in on the strength of the 26th plaintiff's judgment and estop the defendant on the issue of negligence. The reason was that the 26th judgment would clearly seem to be an aberration. Currie then reasoned that, if we should be unwilling to give preclusive effect to the 26th judgment, we should not afford such effect to an adverse judgment rendered in the *first* action brought because 'we have no warrant for assuming the aberrational judgment will not come as the first in the series'. Currie, *supra*, at 289. Currie thus concluded that, absent mutuality, Collateral Estoppel should not be applied where a defendant potentially faces more than two successive actions. Currie, *supra* at 308.

Those courts which have discarded the rule of mutuality and permit the offensive assertion of Collateral Estoppel have generally rejected Currie's solution to the multiple claimant anomaly in situations where the first judgment is adverse to the defendants, and have precluded a defendant from relitigating multiple claims where it has been concluded that the defendant had, in actuality, the incentive and complete opportunity to contest the issue fully in the first action. Currie's reservations were based on the apprehension that the first judgment might well be an aberration, but this view failed to recognize that the very notion of collateral estoppel demands and assumes a certain confidence in the integrity of the end result of our adjudicative process. There is no foundation either in experience of policy for accepting the suggestion that a decision rendered after a full and fair presentation of the evidence and issues should be considered either substantially suspect or infected with variables indicating the question might be decided differently in another go-round. Currie subsequently conceded the untenability

of his initial position and retreated from it, stating that:

> ...so long as we retain sufficient faith in the institution of trial by jury to retain it for civil cases, at all, what warrant is there for mistrusting the verdict for purposes of collateral estoppel when there is no suggestion that there has been compromise or other impropriety? Currie, *Civil Procedure: The Tempest Brews*, 53 Calif. L. Rev. 25, 36, (1965).

Thus, once it is accepted that the propriety of collateral estoppel is dependent upon the existence of a prior full and fair opportunity to present the case, there seems little reason to limit its application simply because there are multiple claimants in the picture. Although in our adversary system 'there is always a lingering question whether the party might have succeeded in proving his point if he had only been given a second chance at producing evidence [citations omitted], the unsubstantiated and conjectural possibility that a party might receive a favorable judgment somewhere down on the road is an insufficient reason for refusing to apply collateral estoppel. As we stated in *In re Gygi*, 75 Or. Adv. Sh. 3690, 3694, 541 P.2d 1392, 1395 (1975),

> "***the prior judgment is treated as conclusive, not because it is actually conclusive evidence of the ultimate truth as to those issues necessarily determined, but because of the public interest in the finality of judgments and in the efficient administration of justice.***"

The deference we lend prior adjudications is based on our reasonable confidence as to their correctness rather than a conviction of their unassailable truth. One of the purposes of the doctrine is to protect the authority of judicial decisions and this purpose would obviously be ill-served by refusing to give effect to a prior determination on the hypothetical possibility of a contrary decision if the case were continuously retried. [Citations omitted.] *State Farm Fire and*

Casualty Company, et al v. Century Home Components, 275 Or. 97, 550 P. 2d at 1189-1190 (1976). (Emphasis supplied.)

There is no fundamental unfairness in applying the doctrine of issue preclusion based upon the result of the first trial in a court of record for, it is respectfully submitted, if the offensive use of the doctrine of collateral estoppel is not applied after the first trial it cannot be applied at all.

This is not unfair to Con Ed because simply determining that Con Ed was grossly negligent in causing the 1977 Blackout does not establish a *res ipsa* case for the respondent. The Court of Appeals in *Goldstein, supra,* mandated that there be a trial on proximate cause. Con Ed has asserted that where the plaintiff is not a user of its electric service by paying for the service directly to Con Ed there is no privity of contract, therefore, no duty either in negligence or in contract. The Appellate Division, Second Department of the State of New York has upheld Con Ed's position and vacated judgments obtained against Con Ed by tenants of apartment house who were injured in public hallways maintained by the landlord. *See, Strauss v. Belle Realty Co.*, 98 A.D.2d 424, 469 N.YS.2d 948 (2d Dept., 1983).

In weighing the rights of Con Ed against the public's interest in the finality of judgments and the efficient administration of judgment, Con Ed's contention that it is entitled to not only "fairness" but "fundamental fairness", in light of all the circumstances, must fall.

The conjectural possibility that a party might receive a favorable judgment somewhere down the road is an insufficient reason for refusing to apply the offensive use of the doctrine of collateral estoppel.

CONCLUSION

The writ of certiorari should not issue.

Respectfully submitted,

JESSEL ROTHMAN
170 Old Country Road
Mineola, New York 11501
(516) 294-9449
Counsel of Record for Respondents
Morris and Ruth Goldstein

Of Counsel:
Lisa J. Rinaldi, Esq.